

Separation & Divorce

Divorce is the legal process that terminates a marriage and allows the parties to remarry. While the divorce process is relatively straightforward, both parties must realize that a divorce will bring significant changes to their individual lives. Aside from the obvious emotional issues, significant physical and economic issues will arise if for no other reason that it is simply more expensive to maintain two households than one. This fact sheet answers some of the most important questions a couple contemplating separation or divorce will have.

Q. What services does the Northern Law Center-SHAPE (NLC-SHAPE) offer for couples contemplating separation or divorce?

A. NLC-SHAPE provides confidential legal counseling regarding separation and divorce. Legal assistance attorneys can advise you on where you can file for divorce, what are the possible consequences of a divorce, how divorce will affect child custody, and provide answers to many questions you may have. Additionally, legal assistance attorneys can prepare a separation agreement for you and your spouse.

Q. What is a separation agreement?

A. A separation agreement is a contract between the spouses that can address issues such as property division, division of debts, spousal support, child custody, and child support. It can be as broad and comprehensive as you wish or can be rather simple and short. A separation agreement can help make getting a divorce faster and cheaper by resolving issues before filing for divorce. Also, some states (e.g., New York) require a separation agreement before a divorce can be filed.

Q. How can we divide our property in the separation agreement?

A. The separation agreement can divide all types of property, including real estate, such as a home; tangible personal property, such as cars, jewelry, and furniture; and intangible property, such as bank accounts, IRA accounts, pensions, and insurance. Generally, you and your spouse are free to divide your property any way you want in your separation agreement, and the judge is likely to accept it. You should, however, consider how a judge might divide your property if you and your spouse can't agree.

Each state has its own rules for dividing property. Generally, marriage is considered to be a partnership between two parties, the husband and the wife, and when the partnership breaks up the marital assets are divided between the two partners on a 50-50 basis. Property may be considered a marital asset even if only one person's name is on the title or if one person bought it with her own money.

Separate property generally cannot be divided. Separate property includes items acquired and paid off before the marriage and property acquired as a gift or inheritance, even if acquired during the marriage. Some states also consider pension rights to be separate property, if those rights are not vested at the time of the divorce.

The judge does not always use a 50-50 split, if the judge decides that 50-50 is not fair. For example, if one spouse has custody of the children of the marriage, that spouse may need additional property to raise the children. The judge may consider each party's financial and other contributions to the marriage, tax consequences, and whether a spouse has other support obligations. Fault (e.g., adultery or abuse) can also be used by a judge when making a property division.

Q. Is a military pension/retirement divisible?

A. Yes.

Q. Can we also divide our debts in the agreement?

A. Yes. The same general principles discussed above in the sections on division of property apply when dividing debts. The parties are free to divide their debts in any way they see fit. In addition to those general principles, you may also want to consider who received the benefit from the debt before deciding who should be responsible for paying it off. For example, a student loan probably benefits only the spouse who actually went to class, so it might be fair for that spouse to pay off that debt. By the same token, it might be fair for the spouse keeping the car to also pay off the car loan. When identifying who pays which debts, include enough information to identify the specific debt involved.

Q. What if my spouse fails to pay a debt as required under our separation agreement?

A. The separation agreement is binding only between you and your spouse and has no effect on third parties. If your spouse fails to pay a joint debt for which he is responsible under the separation agreement, the creditor may demand payment from you. Your remedy in that case is to sue your spouse and ask the court to order your spouse to reimburse you for the amount of money you had to pay. Your legal assistance attorney can help you find some simple ways to protect yourself from this situation.

Q. Can the court modify the terms of our separation agreement concerning our property or our debts?

A. Unlike provisions for child custody and support, which are always modifiable, the provisions for division of property and debts are seldom modified by the court, except in limited circumstances, such as fraud, coercion, or lack of capacity.

Q. I don't have a court order yet, but my spouse is in the Army. Am I entitled to any spousal support right now?

A. Unless you are in the military yourself, your Army spouse is usually required to pay you some amount of support based on the soldier's BAQ entitlement. (Please see AR 608-99, paras 2-4 through 2-6.) Other branches of the military have the following regulations regarding family support: Air Force – AFI 36-2906; Navy – MILPERSMAN ART. 1754-030; and Marine Corps – LEGALADMINMAN, Chap 15. Some states also allow a spouse to request alimony until the

divorce becomes final. NLC-SHAPE can help you determine how much support you should expect or how much you should pay.

Q. How much alimony should I get in my separation agreement?

A. As with property and debts, you and your spouse may determine the amount you think is appropriate, and the judge is not likely to disagree with whatever you come up with. Keep in mind, however, that permanent alimony has fallen into disfavor with courts. Nevertheless, there are some general factors that affect alimony, such as the length of the marriage, the work and education history of the spouses, the financial needs and resources of the two spouses (Military couples should consider the possibility of the soldier losing the BAQ entitlement when the divorce becomes final), and any marital fault. If you agree that no alimony will be paid, that should be noted in your separation agreement.

Q. How long should alimony last?

A. If you decide that alimony is required, its duration also depends on you and your spouse (or the judge, if you can't agree). At a minimum alimony should terminate upon the death of either party or upon the remarriage of the recipient. Alimony may also be for a much shorter time, such as to give the receiving spouse time to go to school and gain the skills to provide for himself.

Q. Is alimony tax-deductible?

A. Alimony is deductible by the payor. The recipient must include alimony received on their tax return as income.

Q. Who gets custody of the children?

A. Unlike property division and alimony, any agreement between you and your spouse is subject to review by the court using the “best interest of the child” standard. For more information on custody, please talk with a legal assistance attorney or read our fact sheet “Custody and Visitation.”

Q. Will a separation agreement stop my spouse from harassing me?

A. Although separation agreements often contain such a provision, it is very difficult to enforce. For harassment by a military spouse, the military spouse's commander can order him or her not to contact the non-military spouse. For harassment by a non-military spouse, barring him or her from the installation or getting a restraining order are probably the best options.

Q. If I get a separation agreement, does my spouse have to sign it?

A. No. You cannot force your spouse to sign a separation agreement. Like any contract, the separation agreement gains its validity from the signature of both parties.

Q. Do I need a separation agreement for an Advance Return of Dependents?

A. No. That you are having serious marital difficulties is sufficient for an advance return of dependents. Often a letter from a professional, such as a lawyer, chaplain, or marriage counselor, is all that is necessary to verify your marital difficulties.

Q. I have a separation agreement and an approved request for Advance Return. Does my spouse have to leave?

A. No. Your spouse may lose command sponsorship and be barred from the facilities here, but your spouse is not obligated to go back to the States if he or she doesn't want to.

Q. After the separation agreement is signed, can I "date" other people?

A. No. You are married until your divorce is finalized by judicial decree. Soldiers may be prosecuted under the UCMJ for adultery, if they have sex with anyone else before the divorce has been finalized by a judge. Adultery can also have adverse consequences on the financial settlement in your divorce decree. Most importantly, dating adds more emotion to an already very emotional time, which may make the divorce more confrontational and that will only make it more expensive and time-consuming.

Q. Can the separation agreement set out how we file our income taxes?

A. Yes. By choosing the best filing status, you can often save significantly on your tax bill. Once the divorce is final, you can no longer file as "married." Your income tax filing status may change before or after the divorce, so both spouses should review their tax withholding and make any adjustments required in their filing status or number of dependents.

Q. If I need a lawyer, who pays for that?

A. Generally you have to pay for your own attorney in a divorce case, unless you have agreed otherwise in a separation agreement or the judge requires your spouse to pay your lawyer's fees.

If both spouses agree with the provisions of the proposed divorce, it is common to split the attorney fees and court costs evenly between the spouses. You should also shop around for a lawyer who won't charge too much. An uncontested divorce is a simple procedure, so there's no reason to pay a very large fee just to have someone file a few simple forms.

Q. Does it matter who actually files for the divorce?

A. It depends. If it is a "no fault" or uncontested divorce, it will usually not matter who files for the divorce. Some jurisdictions, however, don't charge any filing fees for military defendants, so it may be cheaper for the non-military spouse to file. Also, if the person filing is low-income, there may be no charge for filing the divorce. If the divorce is contested, the party alleging fault is usually the party who files for the divorce.

Q. What if my spouse won't give me a divorce?

A. Your spouse may be able to make it difficult to obtain a divorce, but your spouse cannot completely stop a divorce. If your spouse does not want a divorce, it will take longer and probably be more expensive, but you can still get one.

Q. How does the court procedure actually work?

A. Following is a brief summary of a divorce proceeding. The amount of time a divorce takes will vary from state to state and even from court to court within a state. The first step in a divorce proceeding is to meet the filing requirements, which usually include residency and the

ground for divorce. Residency requirements can be as short as six weeks (Nevada), but are often six months. If there is any dispute about child custody, then you may have to file in the state where the child has been living for the six months immediately preceding the divorce filing.

Similarly, there is discrepancy in the allowable grounds for divorce among the states. Traditional grounds include adultery and abuse. More often, especially with an uncontested divorce, the ground is separation for an extended period of time or irretrievable breakdown of the marriage. The ground alleged often affects the waiting period for a divorce.

Once the divorce is filed, a copy is served on the other spouse. The other spouse is then given a short period (usually a few weeks) to submit a response to the court. If your spouse consents or does not file an answer, the judge may grant a judgment.

If your spouse does file an answer a trial date will be set. At trial, both spouses can testify and present evidence. Once each spouse has presented his/her case, the judge will decide whether to grant the divorce, how to split up your property and debts, what child custody or visitation will be awarded, and other issues involved in your case.

Q. That seems pretty long. Is there a quicker way?

A. No. Offers for quick divorces in Guam or outside the United States should be ignored. These divorces have questionable validity and can cause future problems.

Q. Can I get a divorce in Belgium?

A. Persons living in Belgium may obtain a divorce in a Belgian court. Before proceeding with a Belgian divorce, however, you may wish to contact the Northern Law Center-SHAPE to discuss the pros and cons of a Belgian divorce.

Q. Is my divorce final when the judge signs the decree?

A. Not always. In some states there is a waiting period after entry of judgment before the divorce becomes final. The decree itself should state its effective date.

Q. Can I get my maiden name back in the divorce?

A. Yes.

Q. Can my spouse and I see the same lawyer?

A. Sometimes. Only if you have already reached agreement or are likely to reach agreement on all of the important issues involved in your divorce or separation can you see the same lawyer and have that lawyer prepare your separation agreement. In a situation like this, the lawyer does not represent either party, but is an impartial mediator who provides information to both parties and discusses possible solutions to the issues involved in the divorce or separation. Spouses who are able to cooperate with each other to resolve these issues fairly and amicably can often get a separation agreement more easily through mediation than through traditional legal assistance.

Q. Is there anything else I should do before the divorce?

A. Yes. Among other things:

1. Both spouses should consider canceling joint financial arrangements, such as credit cards, bank accounts, and phone calling cards. The military spouse should file a disclaimer with AAFES and other check-cashing facilities to avoid being held liable for the non-military spouse's bad checks, and should put a block on DPP or similar plans at AAFES for the same reason. AAFES disclaimers must be renewed every year, until the divorce becomes final.
2. Both spouses should consider canceling powers of attorney, making new wills, and changing the beneficiaries of life insurance policies, including SGLI.
3. If you and your spouse get back together and live with each other after the separation agreement is signed, the validity and legal effectiveness of the separation agreement may be damaged or destroyed.
4. If both spouses agree not to follow one or more of the provisions of the separation agreement, you should sign an amendment to the separation agreement or a new separation agreement. To change court-ordered child support, you must go back to court.
5. For the military member, separating or divorcing may change your entitlements. When you separate or divorce, you should contact your servicing finance office and notify your chain of command.

Remember, each case is different. This summary gives you general information only. It is not a substitute for talking with a lawyer.

Separation & Divorce is distributed by the Northern Law Center-SHAPE, located in Building 318 on SHAPE. Our office hours are 0900 to 1700 Monday through Friday. You may call us for an appointment at DSN 423-4868/civilian (32) 65 44 48 68. Check out our web site at <http://www.usagbenelux.eur.army.mil/sites/installation/legal.asp> for other helpful information on other legal topics.